FOR ARGUMENT

No. 92-8841

In The

Supreme Court of the United States

October Term, 1993

KITRICH POWELL,

Petitioner,

v.

THE STATE OF NEVADA,

Respondent.

On Writ Of Certiorari To The Supreme Court Of Nevada

REPLY BRIEF FOR PETITIONER

MICHAEL PESCETTA
Executive Director
Nevada Appellate and
Postconviction Project
330 South Third Street, Suite 701
Las Vegas, Nevada 89101
(702) 384-6010
Attorney for Petitioner

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

26 pp

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES CITED:

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

Argument

1. The Crucial Questions of the Applicability of *Griffith v. Kentucky* and *County of Riverside v. McLaughlin* are Undisputed.

The voluminous briefing submitted by respondent and amici curiae does not contradict substantial portions of petitioner's argument. Petitioner submits that the following dispositive points of his argument are undisputed: First, that he did not receive a probable cause determination after his warrantless arrest within the forty-eight hour time limit prescribed by *County of Riverside v. McLaughlin*, ___ U.S. ___, 111 S.Ct. 1661 (1991); second, that *McLaughlin* was decided before petitioner's case was final on direct appeal; and finally, that under *Griffith v. Kentucky*, 479 U.S. 314 (1987), any decision on the merits of the *McLaughlin* issue in this case must be governed by the *McLaughlin* standard.

With respect to these points, petitioner relies upon the arguments presented in the opening brief. While we believe that these three undisputed points demonstrate petitioner's right to relief on the question presented in the petition for certiorari, we turn to the issues which respondent and amici do contest.

2. This Court Has Jurisdiction to Resolve the Question Presented on Certiorari Because the Lower Court Clearly Passed Upon the Federal Question.

Respondent's remarkable argument that the Nevada Supreme Court did not decide the *McLaughlin* issue in this case, and thus that there is no federal question before this Court, is groundless. The operative language in the court's decision could hardly be plainer:

> "The *McLaughlin* case renders NRS 171.178(3) unconstitutional insofar that it permits an initial

> appearance up to seventy-two hours after arrest and instructs that non-judicial days be excluded from the calculation of those hours. Based on *McLaughlin we hold* that a suspect must come before a magistrate within forty-eight hours, including non-judicial days, for a probable cause determination."

JA 6, *Powell v. State*, 108 Nev. 700, 838 P.2d 921, 924 (1992) (footnote omitted; emphasis supplied). Petitioner frankly cannot understand how a decision "hold[ing]" that a federal constitutional precedent "renders [a state statute] unconstitutional" can be read as anything but a decision of a federal constitutional issue. It is equally clear that the sole ground relied upon by the Nevada Supreme Court for its refusal to apply *McLaughlin* to petitioner's case was its erroneous understanding of the controlling federal law on the retroactivity of constitutional rules. It is only after enunciating its "hold[ing]" under *McLaughlin* that the court's opinion denies petitioner the benefit of the "requirement mandated by *McLaughlin*", JA 6 n.1, 838 P.2d at 924 n.1, solely by reference to the pre-*Griffith* law of retroactivity. *Id.*

Comparison of the language used by the court below with language which this Court has viewed as showing that a federal constitutional ground for a decision is present demonstrates the error of respondent's position. For instance, in *Washington v. Chrisman*, 455 U.S. 1, 5 n.5 (1982), this Court relied upon the fact that the decision below "repeatedly refers to the Fourth Amendment and our cases construing it." And in *Cohen v. Cowles Media Co.*, ___ U.S. ___, 111 S.Ct. 2513, 2517 (1991), this Court viewed the fact that the state court

> "rested its holding on federal law could not be made more clear than by its conclusion that in this case enforcement of the promise of confidentiality under a promissory estoppel theory

> would violate defendants' First Amendment rights. [Citations]."

See also *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 568 (1977) (lower court's decision "did not mention the [state] Constitution, citing instead this Court's First Amendment cases as controlling"); *Oregon v. Kennedy*, 456 U.S. 666, 671 (1982) ("fair reading of the decision below" showed reliance on federal law because cases cited for guiding general rule were decisions of this Court).

Here, the Nevada Supreme Court explicitly invalidated a state statute, "citing . . . this Court's [opinion in *McLaughlin*] as controlling", and the lower court's decision "repeatedly refers" to *McLaughlin*. The language used by the Nevada Supreme Court is unequivocal in its reliance upon federal law. Cf. *Charleston Assn. v. Alderson*, 324 U.S. 182, 185 (1945) (jurisdiction would be established on appeal if "it appears from the opinion of the state court of last resort that a state statute was drawn into question, as repugnant to the Constitution, and that the decision of the court was in favor of its validity. . . . ") Under these circumstances, the only "fair reading of the decision below" is that it did in fact decide the federal question regarding the validity of its own law in light of *McLaughlin*.

In attempting to argue that the lower court did not decide the *McLaughlin* issue, but only a question of state practice under the first appearance statute, respondent contends that state law and practice do not in fact combine the probable cause determination with the first appearance under Nev. Rev. Stats. § 171.178, as posited in the Nevada Supreme Court's decision. Resp. Br. at 14. This argument is improper, since it is not supported by any citation to the record before this Court or to any other authority. Accordingly, this part of respondent's argument should be disregarded or stricken. Respondent

is not, of course, the arbiter of state law: to the extent that respondent is attempting to contradict the Nevada Supreme Court's understanding of state law, it is directing its argument to the wrong tribunal. Further, respondent offers no factual basis, in the record or otherwise, which would require this Court to reject the Nevada Supreme Court's view as to the character of its own state's proceedings.[1]

Similarly groundless is respondent's contention that the federal question is not before this Court because the

---

[1] If respondent's contentions on this point are considered, they actually support petitioner's position. Assuming, as respondent asserts, that the probable cause determination is not combined with the first appearance under Nev. Rev. Stats. § 171.178, and that obtaining the probable cause review is simply a matter of placing the detention form before the magistrate, then the entire detention after the afternoon of petitioner's arrest was unnecessary and therefore illegal under *McLaughlin*. More significantly, this assertion also eviscerates any claim that the delay was justified by reasonable reliance on a presumptively valid state statute, under *Illinois v. Krull*, 480 U.S. 340 (1987). No Nevada statute explicitly refers to the judicial procedure for making the probable cause determination. If, as respondent asserts, the probable cause review is not delayed in order to allow combination with the first appearance, see *McLaughlin, supra*, 111 S.Ct. at 1669, then there conclusively could be no good-faith, reasonable reliance upon the time limit in the first appearance statute as a justification for the delay in the probable cause determination. Thus by asserting that the two proceedings are unrelated, respondent is effectively conceding that *Illinois v. Krull* is irrelevant to the disposition of this case.

In any event, as noted in petitioner's opening brief, the statute which provides for the first appearance prohibits "unnecessary" delay and it therefore does not ipso facto validate a seventy-two hour delay. Like the *McLaughlin* rule, the statute merely shifts the burden of showing unnecessary or justified delay at that point. Nev. Rev. Stats. § 171.178(1,3).

resolution of the *McLaughlin* issue in the Nevada Supreme Court opinion is dictum, merely advising the authorities of the changes in state procedure required by *McLaughlin*. As shown above, the language of the decision simply will not bear this interpretation. Moreover, respondent's position embraces a primary evil which results from purely prospective constitutional decisionmaking, namely the reduction of the decision to an advisory opinion. As this Court has recognized, giving the benefit of a new constitutional rule, at minimum, to the party before the court is "an unavoidable consequence of the necessity that constitutional adjudications not stand as mere dictum." *Stovall v. Denno*, 388 U.S. 293, 301 (1967). When a court announces a purely prospective rule, as the Nevada Supreme Court did here, the rule is in some sense always dictum: by definition the rule is not applied to the case before the court, so resolution of the issue cannot affect the disposition of the case; and, being unnecessary to the disposition of the case, the rule announced is always, in that sense, *obiter*.

The constitutional and policy objections to purely prospective decisionmaking have recently been analyzed at length, and petitioner will not repeat that analysis. *Harper v. Virginia Dept. of Taxation*, ___ U.S. ___, 113 S.Ct. 2510, 2520-2523 (1993) (Scalia, J., concurring); see also *James B. Beam Distilling Co. v. Georgia*, ___ U.S. ___, 111 S.Ct. 2439, 2449-2450 (1991) (Blackmun, J., concurring in judgment); *People v. Hitch*, 12 Cal.3d 641, 655, 527 P.2d 361, 371 (1974); (Mosk, J., dissenting). Further, acceptance of respondent's position would result in the potential insulation of every erroneous decision of a federal constitutional issue: as long as the state court announces that its decision is prospective only, and thus merely dictum in the present case, there would never be a federal question presented for review. Such a rule would be an absurd anomaly.

Respondent also claims that the federal question is not properly before this Court because it was not "pressed or passed upon below," relying upon *Illinois v. Gates*, 422 U.S. 213, 219 (1983). Respondent's characterization of *Gates* is highly misleading, insofar as respondent implies that the issue must have been raised by the party in the lower court. Then-Justice Rehnquist's opinion for the Court in *Gates* explicitly recognized that the Court had "developed the rule that a claim would not be considered here unless it had been *either* raised or squarely considered and resolved in state court. [Citations]." *Id.* at 218 n.1. Thus it is simply untrue that the failure of the party to raise the federal issue below necessarily bars review by this Court. To the contrary, it is, literally, hornbook law that:

> "Where the highest state Court assumes or holds that a federal question is properly before it and then proceeds to consider and dispose of that issue, the Supreme Court's concern with the proper raising of the federal question in the state courts disappears. *Orr v. Orr*, 440 U.S. 268, 274-75 (1979); *Whitney v. California*, 274 U.S. 357, 360-61 (1927); *Manhattan Life Ins. Co. v. Cohen*, 234 U.S. 123, 134 (1914). 'There can be no question as to the proper presentation of a federal claim when the highest state court passes on it.' *Raley v. Ohio*, 360 U.S. 423, 436-37 (1959). It is enough if the state court 'reached and decided it' (*Jenkins v. Georgia*, 418 U.S. 153, 157 (1974)) 'as though properly raised' (*Ocala Star-Banner Co. v. Damron*, 401 U.S. 295, 299 n.3 (1971)). See also *Ward v. Village of Monroeville*, 409 U.S. 57, 61 (1972); *Franks v. Delaware*, 438 U.S. 154, 161-62 (1978); *Payton v. New York*, 445 U.S. 573, 582 n.19 (1980).
>
> Once it is clear that the highest state court has actually passed on the federal question, any inquiry into how or when the question was raised in the state court is considered irrelevant to the exercise of the Court's jurisdiction."

R. Stern, E. Gressman, S. Shapiro, and K. Geller, *Supreme Court Practice* § 3.18 at 131 (7th ed. 1993); accord, *Cohen v. Cowles Media Co.*, ___ U.S. ___, 111 S.Ct. 2513, 2517 (1991); see also *Ylst v. Nunnemaker*, ___ U.S. ___, 111 S.Ct. 2590, 2593 (1991).

This rule is based upon the respect which is due to the state's interest in the regularity of its own proceedings: if the highest court of the state does not view its interest in a procedural bar as sufficiently compelling to justify a refusal to address a federal issue, "a federal court implies no disrespect for the State by entertaining the claim." *Ulster County Court v. Allen*, 442 U.S. 140, 154 (1979) (footnote omitted). Here, the Nevada Supreme Court did address the federal constitutional question and did not invoke any available procedural bar under state law. Accordingly, the issue is properly before this Court.

In attempting to avoid the obvious terms of the Nevada Supreme Court's decision addressing the constitutional issues on the merits, the state amici curiae ask this Court in effect to reverse *Harris v. Reed*, 489 U.S. 255, 261 (1989), and *Michigan v. Long*, 463 U.S. 1032 (1983). States Br. at 13-14. These cases require a "plain statement" that a state court decision rests upon an independent and adequate state ground before this Court will conclude that there is no basis for exercising its jurisdiction. Amici simply assert, without analysis, that the silence of the state court opinion as to any issue of procedural bar, and the failure to invoke any such ground for denying relief, should be construed as in fact a reliance upon the procedural bar. Nothing in this naked assertion suggests a basis in principle or policy for returning to the ad hoc analysis of the grounds of the state court decision in which this Court had to engage before *Michigan v. Long*.

The burden of resolving ambiguities in lower court decisions, which the "plain statement" rule is designed to avoid, would be multiplied endlessly if a party could raise as a bar to this Court's jurisdiction any state procedural or substantive rule which could be imagined, whether or not the lower court relied upon, discussed, or even considered that bar. This would re-introduce, in an aggravated form, precisely the same problems of doctrinal inconsistency, reliance upon unclear state law rules, and confusion and waste of resources that the "plain statement" rule is designed to avoid. *Michigan v. Long, supra,* 463 U.S. at 1039-1041. The radical suggestion of the state amici curiae should be rejected out of hand.

As shown in petitioner's opening brief, the Nevada Supreme Court clearly had the power to reach the constitutional issues under its own procedures. Neither respondent nor amici curiae claim that there is any basis in federal law for denying the Nevada Supreme Court the power to determine the *McLaughlin* issue sua sponte; and the propriety of the Nevada Supreme Court's power to do so under state law is a question over which this Court has no jurisdiction. E.g., *Herb v. Pitcairn,* 324 U.S. 117, 125-126 (1945). Since the Nevada Supreme Court did decide the federal constitutional question, this Court plainly has jurisdiction to review the issue presented on certiorari.

3. The Existence of a Remedy Under State Law Renders Unnecessary any Consideration of the Remedy Required by the Federal Constitution

As shown above, there can be no reasonable dispute that the Nevada Supreme Court held there had been a federal constitutional violation in this case, and that its failure to give petitioner the benefit of that holding violated *Griffith v. Kentucky.* Under the circumstances of this

case, this Court's analysis should end there: it is not required to, and therefore should not, address any issue with regard to the scope of the federal exclusionary rule, because an apparently broader state law remedy exists. The State of Nevada

> " '[I]s free to choose which form of relief it will provide, so long as that relief satisfies the minimum federal requirements we have outlined . . . . ' State law may provide relief beyond the demands of federal due process. . . . but under no circumstances may it confine petitioners to a lesser remedy. . . . "

Harper v. Virginia Dept. of Taxation, supra, 113 S.Ct. at 2520, quoting *McKesson Corp. v. Division of Alcoholic Beverages & Tobacco,* 496 U.S. 18, 44-52 (1990); accord, *Bacchus Imports, Ltd. v. Dias,* 468 U.S. 263, 277 n.14 (1984); see also *California v. Ramos,* 463 U.S. 992, 1013-1014 (1983). Here the Nevada Supreme Court found the existence of the federal constitutional violation and the existence of prejudice to the petitioner due to the introduction at trial of statements elicited as a result of the illegal detention. JA 5, 838 P.2d at 924. Under the state's own remedial law, this would require reversal of the conviction. See *id,* citing *Huebner v. State,* 103 Nev. 29, 32, 731 P.2d 1330 (1987); *Morgan v. Sheriff,* 92 Nev. 544, 546, 554 P.2d 733 (1976).[2]

This Court's jurisprudence compels respect for a state's right to impose its own remedy for a federal constitutional violation, independent of any remedy under federal law. *Welsh v. Wisconsin,* 466 U.S. 740 (1984)

---

[2] Respondent does not argue that any purported waiver of *Miranda* rights would constitute a waiver of the state law remedy for a Fourth Amendment violation, cf. *Brown v. Illinois,* 422 U.S. 590, 603 (1975), nor that such a waiver would be effective without consideration of the effect of the illegal detention upon the voluntariness of any resulting statement. *Id.*

is strikingly similar to petitioner's case. There, the defendant was arrested in his home without a warrant for driving under the influence of an intoxicant and taken to the police station where he refused to submit to a breath analysis test. As a result of the refusal, the defendant's driving privileges were revoked and he was prosecuted for driving under the influence. The state supreme court held that the arrest was proper under the Fourth Amendment, but this Court found that the arrest was illegal under *Payton v. New York, supra,* 445 U.S. 573. State law provided broad remedies for the Fourth Amendment violation which were not dictated by the federal constitution: under state law, a refusal to submit to a breath test would be justified if the arrest was illegal and thus could not result in a license revocation, and evidence of the refusal could not be admitted against a defendant. *Id.* at 744-746. In reversing the judgment, this Court refused to consider what remedy the Fourth Amendment would require:

> "Because state law provides that evidence of the petitioner's refusal to submit to a breath test is inadmissible if the underlying arrest was unlawful, this case does not implicate the exclusionary rule under the federal constitution."

Id. at 746 n.5. This case is indistinguishable: "because state law provides" for the exclusion of petitioner's statement, the case "does not implicate" the issue of the proper remedy under federal law.

In an analogous case, *California v. Byers,* 402 U.S. 424 (1971), the state supreme court held that a statute requiring a motorist involved in an accident to stop and give his name and address violated the privilege against self-incrimination. It upheld the validity of the statute by imposing restrictions on the use of the information given, but it did not apply the statute, as limited, to the defendant who was convicted of violating it, because he could not have anticipated the limitation on the use of the

evidence he failed to provide. This Court reversed on the ground that the statute did not violate the federal constitution. It did not consider the validity of the restriction on use of the evidence required by the "stop and report" statute, however, because its decision of the federal question "removes the premise upon which the use restriction rested." *Id.* at 427 n.3. Similarly, the proper application of *McLaughlin* to this case under *Griffith v. Kentucky* "removes the premise" under which the Nevada Supreme Court denied relief under state law for the Fourth Amendment violation.

Application of *McLaughlin,* as required by *Griffith,* would thus result in reversal regardless of this Court's resolution of any issue with respect to the scope of the exclusionary remedy required by the federal constitution. This Court should therefore adhere to its consistent practice of not addressing constitutional issues which are unnecessary to the decision of the case before it. For instance, in *Standard Oil v. Johnson,* 316 U.S. 481 (1942), a state supreme court upheld a state statute imposing a tax on army post exchanges because the exchanges were not agencies of the federal government, under federal law, within a statutory exemption. This Court reversed on the ground that the exchanges were an arm of the federal government under federal law. It explicitly refused to address whether the imposition of a tax on a federal agency would violate the federal constitution because it had "no way of knowing" how the state court would have resolved that question if it had correctly found that the exchanges were federal agencies. *Id.* at 485. Here, this Court has "no way of knowing" how the lower court would resolve the issue of the appropriate remedy if it had correctly applied *McLaughlin* to petitioner's case, and resolution of that issue is therefore unnecessary to the disposition of this case. See also *Mills v. Rogers,* 457 U.S.

291, 305 (1982) (and cases cited therein) (unclear record as to whether state law grounds for relief would exceed minimal standards imposed by federal constitution justified avoiding unnecessary resolution of constitutional issues by remanding for further proceedings). Accordingly, the Court should vacate the judgment without addressing the scope of any exclusionary remedy under the federal constitution.

4. Violation of the *McLaughlin* Rule Requires an Exclusionary Remedy Under the Federal Constitution

Assuming arguendo that this Court should address the issue of the appropriate remedy under federal law for a *McLaughlin* violation, petitioner submits that exclusion of statements elicited as a result of an illegally-prolonged detention is constitutionally required. See *Brown v. Illinois, supra,* 422 U.S. at 603. The general rule, of course, is that evidence obtained in violation of the Fourth Amendment is subject to exclusion in order to discourage unlawful police conduct. *James v. Illinois,* 493 U.S. 307, 311 (1990). In deciding whether to recognize an exception to this general rule, this Court "has examined whether the rule's deterrent effect will be achieved, and has weighed the likelihood of such deterrence against the costs of withholding reliable information from the truth-seeking process." *Illinois v. Krull, supra,* 480 U.S. at 347. Applying this analysis to the *McLaughlin* situation makes it clear that an exclusionary remedy is both appropriate and necessary.

The *McLaughlin* rule protects the suspect's interest in his or her own liberty. An initial warrantless arrest, based upon an assessment of probable cause made by an officer is the "often competitive enterprise of ferreting out crime," *Johnson v. United States,* 333 U.S. 10, 14 (1948), is

tolerated only as a concession to "the State's reasons for taking summary action. . . . " *Gerstein v. Pugh,* 420 U.S. 103, 114 (1975). Once the arrest has taken place, however, the need to dispense with the warrant requirement disappears, *id.* and any further detention which is unnecessary is constitutionally impermissible and therefore illegal.[3]

Thus it is appropriate to conceptualize the issue, from the vantage point prior to the illegally-prolonged detention, as putting the state to the choice of accomplishing the required probable cause review in a timely manner or releasing the presumptively-innocent arrestee: the most desirable remedy would be a mechanism to force the state either to conduct the required probable cause determination or "to let [the suspect] go." *Gramenos v. Jewel Companies, Inc.,* 797 F.2d 432, 437 (7th Cir. 1986) *cert. denied,* 481 U.S. 1028 (1987); *Wayland v. City of Springdale,* 933 F.2d 668, 670 (8th Cir. 1991); *Cooley v. Stone,* 414 F.2d 1213, 1213-1214 (D.C. Cir. 1969); *see Gerstein v. Pugh, supra,* 420 U.S. at 115.[4] At that point, however, no practical means of legal relief for the suspect exists, since any

---

[3] The idea that unjustifiable and prejudicial delay may invalidate an action which would otherwise be entirely proper is by no means an exotic one. See *United States v. Lovasco,* 431 U.S. 783 (1977) (pre-accusation delay); *Barker v. Wingo,* 407 U.S. 514 (1972) (post-indictment delay). Thus this situation is distinguishable from those presented in *New York v. Harris,* ___ U.S. ___, 111 S.Ct. 1640 (1990), and *United States v. Montalvo-Murillo,* ___ U.S. ___, 110 S.Ct. 2072 (1990), because the detention involved here is not concededly legal.

[4] This situation is quite unlike the one presented in *United States v. Montalvo-Murillo, supra,* 110 S.Ct. at 2077-2079. There, the defendant was in concededly legal custody, but there was a delay in conducting a statutory bail hearing, at which the government showed that he should not be admitted to bail due to his dangerousness and risk of flight. This Court held that the remedy for the delay in the hearing was not release from custody. However, there is nothing in the Court's opinion which

litigation would necessarily consume more time than *McLaughlin* provides for making the probable cause determination. See *McLaughlin, supra,* 111 S.Ct. at 1667; *L.A.E. v. Davis,* 263 Ga. 473, 435 S.E.2d 216 (1993); see also *Cooley v. Stone, supra,* 414 F.2d at 1213-1214; cf. *United States v. Montalvo-Murillo, supra,* 110 S.Ct. at 2079 (adequate statutory remedies to enforce right to release or to bail hearing). Any remedy must therefore be retrospective and must be designed to deter the state from violating the constitutional standard.

The suspect's liberty interest in avoiding unnecessary detention is a powerful one. The strength of the suspect's liberty interest is important because any remedial rule fashioned by this Court will be aimed at affecting the behavior of the police with respect to individuals who have been arrested without probable cause as well as those arrested with probable cause. Respondent and amici implicitly assume that the judicial probable cause review is a mere formality which will always result in continuing the detention, but this is by no means the case: "[r]easonable minds frequently may differ on the question whether a particular affidavit establishes probable cause." *United States v. Leon,* 468 U.S. 897, 914 (1984);

---

suggests that the delay in the bail hearing rendered the continuation of custody illegal, which is precisely the point of *McLaughlin* and *Gerstein.* Further, recognition of the suspect's right to release or to a probable cause review, after the detention has served those interests of the state which are legitimate under *McLaughlin,* is a tool for analyzing the propriety of an exclusionary remedy for the *McLaughlin* violation. Petitioner does not suggest that the proper retrospective remedy for a *McLaughlin* violation is the defendant's release, after probable cause is found to exist by the magistrate; rather, the question is the propriety of an exclusionary remedy for evidence obtained as a result of the illegally-prolonged detention, in order to deter such illegal prolongation.

see also *United States v. Ventresca,* 380 U.S. 102, 109 (1965). Analysis of the propriety of the exclusionary remedy thus cannot focus primarily upon the particular conduct which has already taken place in the individual defendant's case, including, as here, a belated judicial determination that probable cause existed; rather, the rule "operates as a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect. . . ." *United States v. Leon, supra,* 468 U.S. at 906, quoting *United States v. Calandra,* 414 U.S. 338, 348 (1974).

The functional aspect of any exclusionary rule is its effect upon the behavior of the police authorities.[5] An exclusionary remedy which is narrowly tailored, see *United States v. Morrison,* 449 U.S. 361, 364 (1981), to the damage likely to flow from *McLaughlin* violations will encourage the police to submit their judgment as to the existence of probable cause to the constitutionally-required scrutiny of a neutral and detached magistrate as soon as possible. A remedy following the pattern of *Brown v. Illinois* also poses no threat to the legitimate aims of law enforcement. The existence of an illegal detention alone would not result in imposition of a sanction, but would deprive the state only of evidence which it obtained through exploitation of an unnecessarily-prolonged detention. The means of avoiding any sanction –

---

[5] The question of unjustified judicial delay in making the probable cause determination is not presented here. The state amici speculate that the date stamps on the detention form, ROA 11, may reflect the time the form was transmitted to the magistrate, and thus that any delay was caused by the judiciary rather than by the police. States Br. at 21. There is no support in the record for this speculation, and it is inconsistent with the practices prescribed by the police department itself. Las Vegas Metropolitan Police Department, Manual § 5/205.02(21) at 236 (1989).

by timely obtaining the required probable cause review or by not questioning the suspect until it is obtained – are easily available to the police. An exclusionary remedy here has its deterrent effect precisely where it is appropriate: it deters police from using an unnecessary prolongation of detention to place improper pressure on a suspect to speak.

This practice presents a real danger, documented by cases where suspects have been improperly detained in jail for a "long weekend to think about" the charged offense. *United States v. Jernigan*, 582 F.2d 1211, 1213 (9th Cir.), *cert. denied*, 439 U.S. 991 (1978); see *Gramenos v. Jewel Companies, Inc.*, *supra*, 797 F.2d at 437-438. In fact, this Court has recognized that a custodial detention is "likely to be exploited or unduly prolonged in order to gain more information," *Michigan v. Summers*, 452 U.S. 692, 701 (1981) and has "coercive aspects likely to induce self-incrimination." *Id.* at 702 n.15. Pallid euphemisms such as "detention" or "restraint" do not convey the reality and the coercive effect of being locked up in a highly threatening environment. See, e.g., Comment, *The Forty-Eight Hour Rule and County of Riverside v. McLaughlin*, 72 Boston U.L.Rev. 403, 408 n.36 (1993); *United States v. Watson*, 425 U.S. 411, 428 (1976) (Powell, J., concurring); *Moore v. Marketplace Restaurant, Inc.*, 745 F.2d 1336, 1449 (7th Cir. 1985); *Stokes v. Delcambre*, 710 F.2d 1120, 1124-1125 (5th Cir. 1983). An illegally-prolonged detention thus may be a flagrant violation of the Fourth Amendment. *Brown v. Illinois*, *supra*, 422 U.S. at 602-603.

The prospect of exclusion of evidence obtained through exploitation of an illegally-prolonged detention should deter the police from illegally delaying the probable cause review for such improper purposes. Petitioner's position is thus supported by *New York v. Harris*, *supra*, 110 S.Ct. at 1643-1644, where this Court recognized that

the prospect of exclusion of evidence in a home which has been entered in an illegal warrantless arrest should deter such illegal entries.[6]

The cost of such an exclusionary remedy is minimal. An exclusionary remedy in this context will not result in the suppression of "inherently trustworthy tangible evidence" obtained through an illegal search, *United States v. Leon*, *supra*, 468 U.S. at 907, because the state cannot claim that the evidence excluded is incontestably reliable. See *Arizona v. Fulminante*, ___ U.S. ___, 111 S.Ct. 1246, 1256 (1991) (plurality opinion) (involuntary statement unreliable); *Brown v. Illinois*, *supra*, 422 U.S. at 603.[7]

---

[6] *Harris* also held that exclusion of a later statement, obtained during a concededly legal detention, would not deter illegal entries, because the statement was not produced by the manner of the arrest and thus was not a product of the illegality. That is essentially the reverse of the situation presented here: the propriety or impropriety of the initial warrantless arrest is not the focus of *McLaughlin*, and the officer's conduct in making that arrest is not the conduct sought to be deterred by fashioning an exclusionary remedy for a *McLaughlin* violation. See *Webster v. Gibson*, 913 F.2d 510, 513 n.7 (8th Cir. 1990) (distinguishing between illegal arrest and illegal prolongation of detention).

[7] Contrary to the assertions of amici, petitioner does not concede the voluntariness of his statements. The fact that this issue was not previously litigated is by no means a concession. To the extent that development of the factual record would be necessary to the assessment of the propriety of an exclusionary remedy under the federal constitution, further proceedings in the state courts would be appropriate on remand.

Because the illegality consists of the prolonged detention, and that illegal prolongation may contribute to the involuntariness of a statement, a finding of probable cause by a magistrate may not necessarily validate a later statement. Cf. U.S. Br. at 14-15 n.9. If the illegal period of detention has in fact had an affect on the defendant's will and thus on the voluntariness of a

No other sanction is adequate to ensure compliance with *McLaughlin*. As shown above, a suspect has no practical means of enforcing his or her legal right to release or to a probable cause review at the time the *McLaughlin* violation occurs. See also Pet. Br. at 23. One amicus advances the sterile argument that the existence of a civil damages remedy renders the exclusionary rule unnecessary. CJLF Br. at 23; cf. *Mapp v. Ohio*, 367 U.S. 643, 651-653 (1961). A recent case demonstrates the cynicism of this argument. In *Willis v. City of Chicago*, 999 F.2d 284 (7th Cir. 1993), a civil rights plaintiff was awarded $1.00 in damages for a detention which violated *Gerstein*, and, on appeal, the Court of Appeals reversed the award of attorney fees on the ground that the award of nominal damages did not support recovery of attorney fees. *Id.* at 287-290. The idea that the fear of such a civil damages remedy will provide the slightest motivation for a state to comply with the dictates of *McLaughlin* is pure fantasy. See also *Sivard v. Pulaski County*, 809 F.Supp. 631, 639-640 (N.D. Ind. 1992).

Respondent and amici also contend that an exclusionary remedy should not be recognized here because in allowing the delay the police relied in good faith on a presumptively-valid state statute. *Illinois v. Krull, supra*, 480 U.S. 340. As noted in petitioner's opening brief, the first appearance statute does not refer to the probable cause determination at all, nor does it conclusively validate an unnecessary seventy-two hour delay after arrest; and thus there could be no reasonable, good faith reliance upon it to justify the police actions here. Moreover,

---

statement, the taint of that illegality may not be dissipated by the magistrate's probable cause finding, because it is the effect of the illegal portion of the detention which is relevant to the voluntariness inquiry.

respondent now contends that the probable cause review is not combined with the statutory first appearance at all, thus removing as a matter of law any basis for application of *Krull*. Further, since the Nevada Supreme Court, sua sponte, reached out to address an issue not raised by the parties, the record does not contain a factual basis for assessing the existence of good or bad-faith reliance upon any state statute, the reasonableness of any delay, or numerous other factual issues. See *Austin v. Hamilton*, 945 F.2d 1155, 1162 (10th Cir. 1991) (reasonableness of delay is question of fact); see also *United States v. Leon, supra*, 468 U.S. at 923 (assessment of good faith focuses on whether "reasonably well trained officer should rely on the warrant"). To the extent that resolution of these issues requires further factual development, that development must occur on remand, after the Nevada Supreme Court's erroneous judgment declining to give petitioner the benefit of *McLaughlin* is vacated.[8]

Finally, respondent argues that an exclusionary remedy should not be considered because any error in admitting petitioner's statements at trial was harmless. The question of the prejudicial effect of constitutional error is normally left to the lower court in the first instance, e.g., *Yates v. Evatt*, ___ U.S. ___, 111 S.Ct. 1884, 1895 (1991), and

---

[8] Respondent may have an arguably legitimate complaint that the Nevada Supreme Court's disposition of the *McLaughlin* issue should have provided the state with opportunity to establish a factual basis for demonstrating that the delay was necessary, or that taint of the illegal detention had been attenuated, or the existence of any other ground for avoiding exclusion of the defendant's statement. This, however, is a reason for reversing the judgment, not for affirming it. Respondent therefore cannot press this position, since respondent did not file a cross-petition for certiorari on this issue. See, e.g., *Mills v. Electric Auto-Lite*, 396 U.S. 375, 381 n.4 (1970).

respondent offers no argument indicating why the Court should depart from its usual practice here. Respondent also offers no argument for the position that this Court should ignore the Nevada Supreme Court's finding of prejudice, to which this Court, following its consistent practice, should defer. Under these circumstances, the Court need not address respondent's argument on this point.

CONCLUSION

For the reasons stated above and in the opening brief, petitioner submits that the judgment of the Nevada Supreme Court should be vacated and the case remanded for further proceedings in light of *County of Riverside v. McLaughlin* and *Griffith v. Kentucky*.

Respectfully submitted,

MICHAEL PESCETTA
Executive Director
Nevada Appellate and
Postconviction Project
330 South Third Street, Suite 701
Las Vegas, Nevada 89101
(702) 384-6010
Attorney for Petitioner